Bail Slip

The appellant viz. Chellamuthu in Crl.A.No.1043/2000 in the file of the High Court was enlarged on bail as per order dated 4.12.2000 and made in Crl.M.P.No.8304/2000 in Crl.A.No.1043/2000.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.09.2005

CORAM

THE HONOURABLE MR JUSTICE N.DHINAKAR

and

THE HONOURABLE MR JUSTICE M.CHOCKALINGAM

Criminal Appeal No. 1043 of 2000

Chellamuthu ... Appellant.

Vs

State rep. by
Deputy Superintendent of Police,
Omalur Police Station. ... Respondent

Prayer: Appeal against the judgment passed by the learned Principal Sessions Judge, Salem, in S.C.No.126 of 1999 dated : 20.9.2000.

For Appellant : Mr.K.V.Sridharan
For Respondent : Mr.V.Jayaprakash Narayan
Government Advocate (Crl.Side)

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JUDGMENT

(Judgment of the Court was delivered by N. DHINAKAR,J.)

The appellant, who was arrayed as A-1 in S.C.No.126 of 1999 on the file of the learned Principal Sessions Judge, Salem, was tried along with three other accused, who were arrayed as A-2 to A-4. The other three accused were acquitted by the trial Judge and the appellant alone was convicted.

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2. Charge No.1 was framed under Section 4 of the Dowry Prohibition Act against the appellant and the other three accused, who were acquitted. The appellant and the other three accused were also charged under Section 498-A IPC. Charge Nos.3 and 4 were framed against the appellant and three others under Section 302 read with 34 IPC. for causing the death of Gandhimathi and Pappathi respectively. The learned trial judge, while acquitting the appellant and the other three accused under Section 4 of the Dowry Prohibition Act as well as under Section 498-A IPC., found the appellant alone guilty under Section 306 IPC. under Charge No.3, while he acquitted the other three accused under the said charge. Similarly, the trial Judge found the appellant guilty under Section 302 read with 109 IPC. under charge No.4, though the appellant was charged under Section 302 read with 34 IPC. On being found guilty, the appellant was sentenced to 10 years rigorous imprisonment under Charge No.3 and imprisonment for life under Charge No.4. This appeal is against the said conviction and sentence.

3. The allegation against the appellant and the other three accused is that they demanded dowry from Gandhimathi, who hereinafter will be referred to as "D-1", and subjected her to cruelty and later, beat her with a wooden stick and also beat Pappathi, her daughter, who hereinafter will be referred to as "D-2", and thereafter threw the dead bodies into the well. To prove the above charges, the prosecution, before the trial Court, examined P.Ws.1 to 17 and relied on Exs.P-1 to P-21. Refuting the said allegations, the defence examined D.Ws.1 and 2 and marked Ex.D-1.

4. The case of the prosecution, as could be discerned from the oral and documentary evidence, can be briefly summarised as follows:-

P.W.1, Srirangayee, is the mother of Gandhimathi, D-1. P.W.2, Valarmathi, is the elder sister of D-1. D-1 is the wife of the appellant, Chellamuthu. A-2 is the son of A-1 born through his first wife and A-3 is the wife of A-2. A-4 is the mother of A-3. D-1 was given in marriage to the appellant after the death of his first wife. This was ten years prior to the date of incident. At the time of marriage, 5 sovereigns of gold were given as sridhana property. A female child was born to D-1 within two years of the marriage. Later, the appellant took the deceased to his house after the child's birth, where the child died. According to P.Ws.1 and 2, the child was murdered. After one year, D-1 became pregnant and another female child was born in the house of P.W.1. The appellant was owning 12 acres of land and the other accused were residing adjacent to the house of the appellant. D-1 informed P.W.1, her mother, that her husband, viz., the appellant herein, did not want the second female child to live, as he has already a legal heir. When D-1 was sent to the

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house of her husband, she was gifted with silver articles and Rs.5,000/- in cash; but D-1 was not happy in her husband's house and she was complaining to her mother, P.W.1. A Panchayat was convened in the presence of Appa Chetty. Three months thereafter, at about 6.00 p.m., P.Ws.1 and 2 were informed that her daughter, D-1, and her grand daughter, D-2, have died. P.W.1 accompanied by P.Ws.2, 8 and her son, Mathiazhagan, went to the village and found two dead bodies floating in the well. P.W.4, one of the villagers, removed the dead bodies from the well and thereafter, P.W.3, a villager, went to Omalur Police Station and gave a complaint to P.W.14, the Sub Inspector of Police, at noon on 2.4.1994. On the complaint, Ex.P-1, a case in Crime No.570 of 1994 was registered under Section 174 Cr.P.C. and investigation was taken up by P.W.16, the Deputy Superintendent of Police, as D-1 died within seven years of the date of marriage.

5. P.W.16, the Deputy Superintendent of Police, on reaching the scene of occurrence, prepared an observation mahazar, Ex.P-14, and drew a rough sketch, Ex.P-20. He questioned P.W.1 and other witnesses and their statements were recorded. The inquest was conducted by the Revenue Divisional officer, Rajangam. (He died during trial and therefore, the inquest conducted by him was spoken to by P.W.13, the clerk, who knew the hand writing and signature of the said officer). Exs.P-17 and P-18 are the inquest reports relating to D-1 and D-2 respectively. After the inquest, a requisition was sent to the doctor to conduct autopsy on the dead bodies of D-1 and D-2.

6. On receipt of the requisition, P.W.5, Civil Assistant Surgeon attached to Government Hospital, Omalur, conducted autopsy on the dead body of D-1, Gandhimathi, and found the following:-

> "Female body lying on the back with pugilistic attitude with foul smelling. Whole body oedematous and skin peeled off. Maggots present. Greenish discolouration seen all over the body. Eyes and tongue protruded out. Lips swollen and everted. Breast distended. Abdomen greatly distended. Scalp heirs easily pulled out. A frothy reddish fluid from the mouth and nostrils. No external injuries. On opening the thorax, lungs distended. On section, large quantity of frothy blood stained fluid came out."

The doctor issued Ex.P-3, the post-mortem certificate, reserving his opinion pending the receipt of the report of the chemical analyst regarding viscera and the hyoid bone and later, after the receipt of the reports, he gave his final opinion under Ex.P-6 opining that death was on account of asphyxia due to drowning. He also conducted autopsy on the dead body of D-2, Pappathi, and

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found the following:-

> "Female baby lying on the back with pugilistic attitude with foul smelling. Whole body oedematous and skin peeled off. Eyes closed. Tongue inside the mouth. Abdomen distended. Scalp hairs easily pulled out. No external injuries. On opening the thorax:- there is a fracture of ribs 3,4,5,6 - Anterior chest wall right side. Left side all ribs fractured."

The doctor issued Ex.P-8, the post-mortem certificate, and thereafter, the final opinion, Ex.P-11, after the receipt of the reports of the expert regarding viscera and hyoid bone, opining that death was on account of asphyxia due to drowning.

7. P.W.16, in the meantime, examined witnesses and recorded their statements including the doctors. The appellant was arrested by P.W.17 on the direction of P.W.16 on 8.4.1994 at about 8.00 a.m., while he was near Pagalpatty bus stop. The final report was filed after the completion of investigation on 30.8.1995.

8. When the appellant was questioned under Section 313 of the Cr.P.C., on the incriminating circumstances appearing against him, he denied all the incriminating circumstances and he filed a written statement. In the said statement, he has stated that after the death of his first wife, he was not on cordial terms with his son and about four years prior to the date of incident, the family property was partitioned between him and his son. He has stated that as he felt that he and his family members should be taken care of, he married D-1 and that too on the pressure exerted upon him by his relatives and friends. He has further stated that at the time of marriage, he gifted gold jewels to his wife and the evidence of P.W.1 that 5 sovereigns of gold jewels were given to her as sridhana property is false. He also refuted the allegation that the first child was murdered by him, since according to him, the child was a stillborn one and he was not even informed about the said fact and he came to know of it only after the child was buried in the village of P.W.1. He has also denied that he wanted to murder the second child as she happened to be a female and that according to him, four days prior to the date of occurrence, he left for Salem to visit his daughter, Savithri. He further alleged that he returned to the village only on 2.4.1994 and came to know that his wife, Gandhimathi and his daughter, Pappathi, had fallen into the well and that he sent intimation to the parents of the deceased through his farm servant. He has also stated that police officers arrived and he was taken into custody and detained at the police station till he was produced before the Magistrate. He denied the evidence given

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by P.W.3 and that he has also stated that he never quarrelled with his wife, D-1, as claimed by P.W.8 in his evidence. According to him, P.W.8 was not on cordial terms with him and P.W.9 is a close friend of P.Ws.1 and 2. He has also alleged that the prosecution has suppressed the fact that it was he who gave intimation to the police authorities regarding the death of D-1 and D-2 and made it appear as if P.W.3 had given a complaint on seeing the dead bodies and according to him, Appa chetti, the Panchayat Board President, is a close relative of P.Ws.1 and 2 and since a complaint was given against Appa Chetti by his relative, Palanisamy, at Omalur Police Station, a false case had been foisted upon him on the instigation of the said Appu Chetti.

9. The appellant examined D.W.1, Palanisamy, who, in his evidence, has stated that the appellant left for Salem on Tuesday, i.e., four days prior to the date of occurrence, to visit his daughter and returned to the village only on 2.4.1994 and later, on going to the backyard, the appellant found the bodies of D-1 and D-2 floating in the well. According to him, the family property was partitioned between the appellant and his son born through his first wife. D.W.1 has also stated that the appellant went to the police station to lay a complaint and later, he came to know that the police officers, on reaching the scene, took the appellant to the police station and when questioned, he was informed that they are investigating the crime. D.W.2, the son-in-law, of the appellant was examined to say that the appellant visited his house on Tuesday and left on Saturday.

10. The learned counsel appearing for the appellant submits that the trial Judge committed grave illegality in convicting the appellant under Section 302 read with 109 IPC., as no charge was framed against him under the said section, since the charge framed against him under Charge No.4 was only under Section 302 read with 34 IPC. The learned counsel further contends that the trial Judge, having framed a charge under Section 302 read with 34 IPC. as regards the death of D-1 under charge No.3, chose to convict him only under Section 306 IPC. and in the absence of any evidence that the appellant instigated D-1 to commit suicide and the evidence of P.W.8 not having been put to the appellant, when he was questioned under Section 313 of the Cr.P.C., the appellant had no opportunity to give explanation for the alleged incriminating circumstance brought out through the evidence of P.W.8 and therefore, the conviction of the appellant under Section 306 IPC. is also bad in law.

11. The doctor, P.W.5, conducted autopsy on the two dead bodies of D-1 and D-2. The opinion of the doctor, as could be seen from Exs.P-5 and P-11, is that they died on account of asphyxia due to drowning. Exs.P-15 and P-16 are the reports of the experts, who examined the hyoid bone and viscera and the two reports show that no opinion could be given by them as to the

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cause of death. In any event, as we stated earlier, according to the doctor, P.W.5, who conducted autopsy, both D-1 and D-2 died on account of asphyxia due to drowning.

12. The allegation under Charge No.3 against the appellant is that he beat D-1, murdered her and thereafter, threw the dead body into the well. Similarly, the trial Judge framed a charge against the appellant for causing the death of D-2 by alleging in the said charge that D-2 was beaten, murdered and thereafter, the dead body was thrown into the well. The charge framed by the trial Court and the evidence of the doctor, therefore, do not go together, as they are inconsistent. As per the charge, the two deceased, viz., D-1 and D-2, have been murdered and thereafter, the dead bodies were thrown into the well; but as per the evidence of the doctor, P.W.5, who conducted autopsy, death was on account of asphyxia due to drowning, which means that both D-1 and D-2 were alive when they fell into the well. In the above circumstances, it is for the prosecution to show as to how both of them fell into the well – whether they were pushed or fell accidentally, especially when the well had no parapet wall, which could be seen from Ex.P-14, the observation mahazar. The prosecution did not produce any material to infer that both the deceased were pushed into the well. On the contrary, the prosecution came out with a version that both of them were murdered and their bodies were thrown into the well by the appellant.

13. We will now analyse the evidence of the witnesses to find out whether the same can be accepted. The prosecution, through P.W.1, came out with a version that the first female child born to the appellant was murdered by him; but it is to be remembered that no complaint was given either by P.Ws.1. 2, 8 or by P.W.9 regarding the said fact and it is for the first time they had come out with such a version by stating that the first child was murdered by the appellant. There is absolutely no material on record to show that the appellant murdered his first female child and it looks as if that the witnesses were giving evidence with vengeance against the appellant. Though P.Ws.1, 2, 8 and 9 have stated that the appellant informed D-1 that the second child also should be murdered, they did not mention the said fact, when they were examined and their statements were recorded under Section 161 of the Cr.P.C. by the investigating officer and for the first time, they have come out with such version in Court.

14. According to P.W.8, about two or three days prior to the date of incident, he saw the appellant and D-1 quarrelling with each other. P.W.8 is closely related to P.W.1. When cross-examined, he could not say as to the day on which he found D-1 and the appellant quarrelling with each other; but stated that it might have been a Wednesday or a Thursday. During the course of investigation, P.W.8 did not even whisper a word that he saw the

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appellant and D-1 quarrelling with each other and P.W.8 had come out with the present version only in Court. This evidence of P.W.8 was not even put to the appellant, when he was examined under Section 313 of the Cr.P.C. Therefore, the appellant did not have an opportunity to give an explanation for the said evidence given by P.W.8. It is trite that Section 313 Cr.P.C. is mandatory in nature and if no questions are put to the appellant, then the said evidence cannot be used against him to find him guilty. The trial Judge has committed the above illegality by taking the evidence of P.W.8, relying upon it and convicting the appellant, without even questioning him under Section 313 of the Cr.P.C. as regards the said evidence.

15. The prosecution examined P.W.9, who is a mahazar witness, and according to him, he heard D-1 telling P.W.1 that the appellant wanted to murder the second child also. When cross-examined, he has stated that D-1 and P.W.1 were seen talking with each other about two or three days prior to the date of incident; but this evidence of P.W.9 is not supported either by P.W.1 or by P.W.2, since according to them, the deceased was seen alive about three months prior to the date of incident and that they came to know about the death of D-1 and D-2 only on 2.4.1994. It is, therefore, clear that the evidence of P.W.9 that he saw D-1 and P.W.1 talking with each other about two or three days prior to the date of incident cannot be true and it is false on the face of it. If D-1 has actually informed P.W.1 about the decision of the appellant to murder the second child, then P.W.1 would have certainly mentioned the said fact to P.W.16, who registered the crime and later altered it to one under Section 306 and 304-B IPC. A perusal of Ex.P-21, the express report, in the altered crime reads as follows:-

> "Investigation made so far discloses that the husband of the deceased Gandhimathi, Chellamuthu, has ill-treated the deceased Gandhimathi demanding dowry and due to harassment, the said Gandhimathi and her seven months old female child Pappathi have died. Since the offences under Sections 306, 304(B) IPC. and Section 4 of the Dowry Prohibition Act are made out, I am altering the section from 174 Cr.P.C. to Sections 306, 304(B) IPC. and Section 4 of Dowry Prohibition Act."

No where it has been whispered that the appellant was bent upon murdering the second child as he was not inclined to have a female child. It is, therefore, clear that the present version given by the witnesses could only be considered as an after thought. We, therefore, reject the evidence of the witnesses, as not trustworthy and unreliable.

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16. We have already noted that the trial Judge, having framed a charge under Section 302 read with 34 IPC. as regards the death of Gandhimathi, chose to convict the appellant under Section 306 IPC. In DALBIR SINGH -vs- STATE OF U.P. (2004 SUPREME COURT CASES (Cri) 1592, the Supreme Court held that in view of Section 464 Cr.P.C., it is possible for the Appellate or Revisional Court to convict an accused for an offence for which no charge was framed unless the court is of the opinion that a failure of justice would in fact occasion and in order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself.

17. When we look at the facts in this present appeal, it could be seen, as we noted earlier, that though the prosecution relied heavily upon the evidence of P.W.8 to establish that D-1, Gandhimathi, would have committed suicide on account of the quarrel with her husband about two or three days prior to the date of incident, the appellant was not questioned as regards the said evidence, when he was examined under Section 313 of the Cr.P.C. The appellant, therefore, had no opportunity to give an explanation regarding the evidence given by P.W.8. In fact, we have already noticed that P.W.8 could not even say as to the day on which he saw the appellant and D-1, Gandhimathi, quarrelling with each other and that he did not mention the said fact, when his statement was recorded under Section 161 of the Cr.P.C. by the investigating officer and for the first time, in Court, P.W.8 had come out with such a version. Even, at the risk of repetition, we have to say, the Court did not question the appellant as regards the evidence of P.W.8, and therefore, the appellant was completely prejudiced. The trial Court, therefore, was not justified in taking that evidence and convicting the appellant without questioning him on the said evidence.

18. The trial Court framed a charge against the appellant under Section 302 read with 34 IPC. under charge No.4 for causing the death of D-2, Pappathi, by alleging that he has beaten D-2, Pappathi, and threw her body into the well. The trial Court, having framed such a charge, while finding the appellant not guilty as charged, found him guilty only under Section 302 read with 109 IPC. The trial Court totally forgot that Section 109 IPC. is by itself an offence though punishable in the context of other offences. When the direct involvement of the appellant in the crime could not be established, it is difficult to uphold the view of the trial Court that he could lopsidedly be taken to have answered the charge of abetment and convicted on that basis. There would, as is plain, be serious miscarriage of justice to the accused in causing great prejudice to his defence, since the roles

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of the perpetrator and abettor of the crime are distinct, standing apart from each other. The appellant, having faced a trial for an offence of murder for sharing the common intention of the other accused, could in any event be substitutedly convicted for an offence under Section 302 with the aid of Section 109 IPC., since it is not only a legal flaw but also a grave prejudice to the appellant in projecting his defence. Therefore, the conviction of the appellant under Section 302 read with 109 IPC. under charge No.4 cannot also be sustained, as the conviction is illegal on the face of it. In view of the discussion made above, appellant is to be acquitted and he is, accordingly, acquitted.

19. In the result, the appeal is allowed. It is reported that the appellant is on bail. His bail bonds shall stand cancelled.

Bs

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1.The Principal Sessions Judge, Salem.
2.The Judicial Magistrate, No.I, Omalur.
3.-Do- Through The Chief Judicial Magistrate, Salem.
4.The District Collector, Salem.
5.The Director General of Police, Madras.
6.The Deputy Superintendent of Police, Omalur Police Station.
7.The Superintendent, Central Prison, Coimbatore.
8.The Public Prosecutor, High Court, Madras.

1 cc To. Mr.K.V.Sridharan, Advocate SR 38999.

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